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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LUNDY LEWIS

Appeal 2009-000412
Application 09/577,225¹
Technology Center 3600

Decided: June 18, 2009²

Before LEE E. BARRETT, LANCE LEONARD BARRY,
and JEAN R. HOMERE, *Administrative Patent Judges*.

HOMERE, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ Filed on May 23, 2000. The real party in interest is Computer Associates Think, Inc. An oral hearing was held in this appeal on June 10, 2009.

² The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

I. STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's final rejection of claims 1, 3 through 6, 10 through 13, and 30 through 33. Claims 2, 7 through 9, 14 through 18, 20, 28, and 29 have been canceled. Claims 19 and 21 through 27 have been withdrawn. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

Appellant's Invention

Appellant invented a method for providing a service level management (SLM) for a business process of an entity (e.g. Internet/telephone service provider) by monitoring the performance parameters of one or more components (transmission line, router) supporting a particular service (Internet, phone) to thereby optimize the business process. (Spec. 2-3.) As depicted in Figure 1, for each service (12) provided by the business entity, a service parameter (15) (e.g. availability, response time, security, integrity) representing a measure of performance of the service, a component parameter (19) representing a measure of performance of a network component supporting the service, and a relationship therebetween are identified. (Spec. 23: 11-30.) A control agent (20) monitors the values of the component parameters, and subsequently maps them into corresponding values of the service parameters to thereby adjust the SLM. (Spec. 23: 21-24.)

Illustrative Claim

Independent claim 1 illustrates the invention as follows:

1. A method of providing service level management for a business process of an entity, the business process supported by a network, the method comprising steps of:

identifying a plurality of services that the network provides for the entity in performance of the business process, the business process being supported by the plurality of services, each of the plurality of services being supported by a plurality of network components;

identifying, for at least one of the plurality of services, a service parameter that provides a measure of a service level of the at least one of the plurality of services;

identifying a component parameter that measures a performance of one of the plurality of network components;

identifying a relationship between the component parameter and the service parameter;

monitoring a value of the component parameter via a management protocol understood by an electronic device associated with the network; and

taking an action in the electronic device to determine the service level of the at least one of the plurality of services from the value of the component parameter to provide service level management of the business process.

Prior Art Relied Upon

The Examiner relies on the following prior art as evidence of unpatentability:

Ball	US 6,446,200	Sep. 3, 2003
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Rejection on Appeal

The Examiner rejects the claims on appeal as follows:

Claims 1, 3 through 6, 10 through 13, and 30 through 33 stand rejected under 35 U.S.C. § 102(e) as being anticipated over Ball, or in the alternative, as being unpatentable over Ball under 35 U.S.C. § 103(a).

Appellant's Contentions

Appellant argues that Ball does not monitor or, otherwise, identify a component parameter that measures the performance of a network component in order to provide a service level corresponding thereto, as recited in independent claim 1. (App. Br. 4-8, Reply Br. 1-3.) According to Appellant, while Ball teaches collecting and monitoring data (e.g. data flows, network traffic or percentage of availability for a router) from each of a plurality of specific devices in a network, the collected data is aggregated to subsequently determine the quality of the service of the network as a whole. Therefore, Appellant submits that the determined service level in Ball is based upon the aggregated component parameters of the measured devices and not the performance of a specific device itself. (*Id.*)

Examiner's Findings/Conclusions

The Examiner finds that Ball's disclosure of measuring different kinds of metrics from a network, including monitoring packet loss in a router to determine the level of quality service required in a network, teaches the claimed limitations. (Ans. 8.)

II. ISSUE

Has Appellant shown that the Examiner erred in finding that Ball teaches identifying and monitoring a component parameter that measures the performance of a network component to determine the service level of an identified service to provide to the SLM of a business process, as recited in independent claim 1?

III. FINDINGS OF FACT

The following findings of fact (FF) are supported by a preponderance of the evidence.

Ball

1. As depicted in Figure 1, Ball discloses various network devices (12) coupled to an accounting process (14) that collects data of various types and formats from the devices via flow data collectors (18), and transforms the collected data into consistent accounting records. (Col. 3, ll. 9-35.)

2. As shown in Figure 3, Ball discloses an Internet service provider arrangement (100) including an accounting server (13) that runs the accounting process to collect flow data, user's type connection data, and actual network usage data. The collected data is analyzed to enable the Internet service provider to develop new service models that can take into consideration bandwidth usage, as well as the time of day. (Col. 5, ll. 45-67.)

3. As shown in Figure 29, the network (700) includes a plurality of network monitors (702) for detecting packet loss in each network device (e.g. router, switch, access concentrator) through which a packet passes. Upon collecting such data from the devices, the accounting process (14) provides a summary of the number of successfully transmitted packets versus lost packets. (Col. 29, ll. 7-15; col. 30, l. 51- col. 31, l. 10.)

4. Ball also discloses a quality of service process (730) that allows an administrator to observe the actual quality of service that the network delivers to a customer by using the collected data in the accounting process to thereby determine whether the observed quality of service (e.g.

availability) matches the level of service specified in a policy enforcement agreement. In other words, the metrics collected in the accounting process are mapped to the defined policy. (Col. 31, ll. 11-38; col. 33, l. 57-col. 34, l. 6.)

5. Ball further discloses a one-to-one relationship between the performance data measured for a particular device and the service level provided under a policy. (Col. 33, ll. 22-44.)

IV. PRINCIPLES OF LAW

Claim Construction

"[T]he words of a claim 'are generally given their ordinary and customary meaning.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (internal citations omitted). "[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Id.* at 1313 (citations omitted).

"[T]he PTO gives claims their 'broadest reasonable interpretation.'" *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)). Our reviewing court has repeatedly warned against confining the claims to specific embodiments described in the specification. *Phillips v. AWH Corp.*, 415 F.3d at 1323.

Anticipation

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citing *Minn. Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1565 (Fed. Cir. 1992)).

Anticipation of a patent claim requires a finding that the claim at issue ‘reads on’ a prior art reference. In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether it also covers subject matter not in the prior art.

Atlas Powder Co. v. IRECO, Inc., 190 F.3d 1342, 1346 (Fed Cir. 1999) (internal citations omitted).

Obviousness

Appellants have the burden on appeal to the Board to demonstrate error in the Examiner’s position. *See In re Kahn*, 441 F.3d 977, 985-86 (Fed. Cir. 2006) (“On appeal to the Board, an applicant can overcome a rejection [under § 103] by showing insufficient evidence of *prima facie* obviousness or by rebutting the *prima facie* case with evidence of secondary indicia of nonobviousness.”) (quoting *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998)).

Section 103 forbids issuance of a patent when “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been

obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.”

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 406 (2007).

In *KSR*, the Supreme Court emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art" and discussed circumstances in which a patent might be determined to be obvious. *Id.* at 401 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966)) (citation omitted). The Court reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Id.* at 416. The operative question in this "functional approach" is thus "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* at 415, 417.

The Federal Circuit recently recognized that "[a]n obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of a case. Indeed, the common sense of those skilled in the art demonstrates why some combinations would have been obvious where others would not." *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 416). The Federal Circuit relied in part on the fact that Leapfrog had presented no evidence that the inclusion of a reader in the combined device was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Id.* at 1162 (citing *KSR*, 550 U.S. at 417-418).

V. CLAIM GROUPING

Appellants argue the patentability of the claims as a single group on appeal. In accordance with 37 C.F.R. § 41.37(c)(1)(vii), we will consider these claims as standing and falling with independent claim 1.

VI. ANALYSIS

Claim 1

Independent claim 1 recites, in relevant part, identifying and monitoring a component parameter that measures the performance of a network component in order to determine the service level of an identified service to provide to the SLM of a business process.

As set forth in the Findings of Fact section, Ball discloses an accounting process for monitoring devices on a network and for collecting performance data for the same. (FF. 1-3.) Further, Ball discloses matching the collected device performance data with policy data to determine whether the quality of service provided by the network matches the level of service specified in a service agreement. (FF. 4.) Additionally, Ball discloses a one-to-one relationship between the performance parameters measured for a particular device and the service level resulting therefrom. (FF. 5.) We agree with the Examiner that the device data collected in the disclosed accounting process relates to the performance of the devices associated therewith. For example, the packet loss recorded or collected at each of the devices scattered across the network indicates a lack of fidelity in each of such devices. We find that such collected data in the accounting process to be indicative of the performance of the devices in the network.

Further, while Ball discloses aggregating the performance data for the devices to determine the quality of a service in the network, we find that the resulting level of service is a by-product of the performance data for each of the specific devices. We find nothing in the claim language that precludes the performance data for other devices from being used in conjunction with an identified device to determine the quality or the level of an identified service in the network. Nevertheless, we find that Ball's disclosure of establishing a one-to-one relationship between the service level and the performance data of a specific device expressly teaches the claimed limitations. We are, therefore, satisfied that Ball's disclosure of matching of such device performance data with policy data to determine the quality of service being delivered fairly and reasonably teaches, or at least suggests, that the performance data for a specific device is being used to determine the level of service to provide to the SLM in a business process. It follows that Appellants have not shown that the Examiner erred in finding that Ball anticipates or renders unpatentable independent claim 1.

VII. CONCLUSION OF LAW

Appellants have not shown that the Examiner erred in finding that Ball anticipates or, in the alternative, renders unpatentable claims 1, 3 through 6, 10 through 13, and 30 through 33.

VIII. DECISION

We affirm the Examiner's decision to reject claims 1, 3 through 6, 10 through 13, and 30 through 33.

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Application 09/577,225

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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PEB

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